Supreme Court, U. S.
FILED
JUN 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1806

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEOPHIL C. KAMMHOLZ
WILLIAM W. MCKITTRICK
MICHAEL G. CLEVELAND
115 South LaSalle Street
Chicago, Illinois 60603

WILLIAM J. ROONEY
JAMES R. JACKSON
Ford Motor Company
The American Road
Dearborn, Michigan 48121
Counsel for Petitioner

Of Counsel:
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Ford Motor Company, Chicago Stamping Plant (Company), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 18, 1978, enforcing an order of the National Labor Relations Board against the Company.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A17) is reported at 571 F. 2d 993 (1978). The Decision and Order of the National Labor Relations Board (Appendix B, *infra*, pp. A18-A45) is reported at 230 NLRB No. 101 (1977).

JURISDICTION

The decision of the Court below issued on February 22, 1978. On March 23, 1978, the Court denied the Company's Petition for Rehearing En Banc (Appendix C, *infra*, p. A46). The April 18, 1978, judgment of the Court below is reproduced as Appendix D, *infra*, pp, A47-A48. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The basic question is whether in-plant cafeteria and vending machine food prices are "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act, as amended, and therefore mandatory subjects of collective bargaining.

A subsidiary question is whether in-plant food services are also "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151 *et seq.*), are set forth in Appendix E, *infra*, p. A49.

STATEMENT OF THE CASE

In this case a panel of the Court of Appeals enforced a Decision and Order of the National Labor Relations Board in which the Board, *inter alia*, found that the Company had unlawfully refused to bargain with Local 588, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (Union), concerning in-plant cafeteria and vending machine food prices and services, and ordered the Company to bargain with the Union concerning food services and changes in food prices (App. A, p. A17; App. B, pp. A26-A27).

A—The Facts

The Company operates an automotive parts stamping plant in Chicago Heights, Illinois (App. A, p. A2). Hourly rated production and maintenance employees are represented by the Union (App. A, p. A2).

The Company provides its employees two air conditioned cafeterias and five air conditioned food vending areas (App. A, p. A2). Since 1970, an independent food caterer, ARA Services (ARA), has serviced these areas, providing food and vending machines (App. A, p. A2; App. B, p. A32).

The agreement between the Company and ARA, subject to termination by either party on 60 days' notice, provides that the Company will reimburse ARA for its direct costs of the food and vending operations plus a 9% surcharge for administrative costs and service fees (App. A, p. A3). If receipts exceed this amount, the excess will be returned to the Company (App. B, p. A20). If receipts are less than costs plus the surcharge, the Company is obligated to subsidize ARA up to an annual amount not to exceed $52,000 (App. A, p. A3). In recent years the operations have been on a loss basis and the Company has made up annual losses to ARA (App. A, p. A3).

All employees are provided a 30-minute lunch period and two 22-minute rest periods daily (App. B, p. A20). Although they may do so, very few employees leave the plant during their lunch breaks (App. B, p. A20). They are not entitled to leave during the 22-minute breaks (App. B, p. A20).

Employees may bring their own food into the plant and store it in their personal lockers (App. A, p. A2). A Union witness testified that the lockers are not air conditioned and, during the summer, become hot (App. A, p. A2; App. B, p. A35). This witness also testified that employees have complained about spoilage of food stored in their lockers (App. A, p. A2; App. B, p. A35).

The present controversy developed when the Company was informed by ARA that, effective February 9, 1976, it would increase the prices of certain food items sold in the cafeteria and vending areas by either 5 or 10¢ (App. A, p. A5). The Company advised the Union of ARA's plans and refused the Union's request to bargain about the increases prior to ARA's implementing them and subsequently refused to bargain with the Union about food prices and services (App. A, p. A5).

On February 16, 1976, the Union began a boycott of the food service operations in which over half the employees participated. This boycott continued until June 7, 1976, and did not result in a reduction of food prices (App. A, p. A5).

From time to time prior to the February, 1976, price increases, the Company had bargained with the Union concerning various aspects of the food services provided its employees—for example, agreeing that there would be adequate personnel to serve food in the cafeterias, that a facility would be located in a new addition and that broken vending machines would be promptly repaired (App. A, p. A4). At no time, however, did the Company bargain with the Union regarding the prices of food sold in the cafeterias or vending areas (App. A, p. A5).

B—The Board's Decision and Order

The Board, reversing its Administrative Law Judge, found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain about the price increases and about the in-plant food services, and by refusing the Union's request for information about food services at the plant (App. B, pp. A23-A25). The Board held that this conclusion was mandated by its rulings in four prior cases that "in-plant food prices are a mandatory subject of bargaining", notwithstanding that each of the decisions was denied enforcement by a Court of Appeals (App. B, p. A22).[1] The Board rejected the reasoning of the Administrative Law Judge that these Courts of Appeals decisions, coupled with the Board's failure to seek certiorari in the most recent of them, indicated that the Board had accepted the judicial view that in-plant food prices were mandatory subjects of bargaining (App. B, pp. A23-A24). The Board stated that regardless of the reversal of its earlier decisions by the Courts of Appeals, "we adhere to our position that cafeteria and vending machine prices are a mandatory subject of bargaining" (App. B, p. A23). The Board, *inter alia*, ordered the Company to bargain with the Union with respect to food services and any changes, "now in effect or hereafter made or proposed," in food prices charged employees (App. B, p. A27).

C—The Decision of the Court of Appeals

Quoting at length from this Court's opinion in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964), and particularly from Mr. Justice Stewart's concurring opinion, the Court of Appeals held that in-plant cafeteria and vending

1. *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), *enf. denied*, 387 F. 2d 542 (4th Cir. 1967); *McCall Corp.*, 172 NLRB 540 (1968), *enf. denied*, 432 F. 2d 187 (4th Cir. 1970); *Package Machinery Co.*, 191 NLRB 268 (1971), *enf. denied*, 457 F. 2d 936 (1st Cir. 1972); *Ladish Co.*, 219 NLRB 354 (1975), *enf. denied*, 538 F. 2d 1267 (7th Cir. 1976).

machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment, and are therefore mandatory subjects of bargaining (App. A, pp. A8-A10).[2] The Court of Appeals viewed the issue of whether in-plant cafeteria and vending machine food prices and services are terms and conditions of employment within the meaning of Section 8(d) of the National Labor Relations Act as a question to be resolved upon an evaluation of the relevant facts of each case (App. A, pp. A8-A12). On this basis the Court of Appeals factually distinguished this case from an earlier decision by a different panel of the same Court, *NLRB* v. *Ladish Co.*, 538 F. 2d 1267 (1976), and from decisions by the First and Fourth Circuits,[3] all holding that the matter of in-plant cafeteria and vending machine prices is not a mandatory bargaining subject (App. A, pp. A11-A17).

According to the Court of Appeals, these factual distinctions were: the Company retained control over cafeteria and vending machine prices; the Company might make a profit from the food service operation; since 1967 the Company and the Union had bargained over in-plant food services; bringing their own lunches was not a viable alternative for employees; over half of the Company's employees had boycotted the food service operations; and employees were represented by a single union (App. A, pp. A16-A17).

2. Although both the Board and the Court of Appeals found that the Company violated the Act by refusing to bargain with respect to food prices and services, the basic dispute between the parties concerned only the February, 1976, increase in food prices. Services were only incidentally mentioned in an exchange of correspondence concerning prices. At no time did the Union indicate any aspect of services as to which it desired to bargain.

3. See cases cited *supra* n. 1.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with Decisions of the First and Fourth Circuits and with an Earlier Decision of the Seventh Circuit

By virtue of the decision below, there now is a conflict in Courts of Appeals on whether in-plant food prices are mandatory subjects of collective bargaining. The decision below conflicts with decisions of the Courts of Appeals for the First and Fourth Circuits, which reached the opposite conclusion. In *Westinghouse Electric Corp.* v. *NLRB*, 387 F. 2d 542 (1967), the Fourth Circuit, sitting *en banc*, overruled the earlier panel decision and held that Section 8(d), as interpreted by this Court in *Fibreboard Paper Products Corp., supra*, did not require the employer to bargain about price increases implemented by an independent contractor which operated cafeterias in the employer's facility. Subsequently, in *McCall Corp.* v. *NLRB*, 432 F. 2d 187 (1970), a panel of the Fourth Circuit held that in-plant cafeteria and vending machine prices were not mandatory bargaining subjects under the earlier *Westinghouse* decision and rejected the argument that a different result should be reached because the employer and not an independent contractor set food prices. The First Circuit in *NLRB* v. *Package Machinery Corp.*, 457 F. 2d 936 (1972), held that cafeteria and vending machine prices charged by an independent contractor, which the employer subsidized, were not mandatory subjects of bargaining.

Moreover, the decision below conflicts with the Seventh Circuit's earlier decision in *NLRB* v. *Ladish Co., supra*. In that case, the Court held that the employer was not required to bargain about food prices charged in vending machines owned and maintained by an outside contractor.

Accordingly, certiorari should be granted to resolve this conflict between the Circuits and between different panels of the Seventh Circuit. The assertions of the Court below that this

case is distinguishable from other decided cases dealing with in-plant food prices simply do not withstand analysis.

First, both the Board and the Administrative Law Judge recognized that this case presents the same issue which was raised in the decisions of the First and Fourth Circuits and in the earlier Seventh Circuit decision. As the Board stated: "The Administrative Law Judge correctly found . . . that the present case falls within the factual and legal context of the Board's decisions in *Westinghouse Electric Corporation, McCall Corporation, Package Machinery Company,* and *Ladish*" (App. B, p. A22; footnotes omitted).[4] However, the Board did not deem itself bound to follow these decisions and criticized the Administrative Law Judge for following them rather than following the Board's prior rulings.

Second, and fully as important, the "distinctions" focused on by the Court are not material or are without legal significance.

A. *Influence over Prices.* Although the Court below sought to find that the Company controlled food prices and services by virtue of its right to review prices and the "leverage" afforded by the subsidy agreement, much greater employer control was involved in *McCall Corp.* v. *NLRB, supra,* where the employer in fact established food prices and supplied the food. Likewise, in both *Westinghouse Electric Corp.* v. *NLRB, supra,* and *NLRB* v. *Package Machinery Co., supra,* the employers subsidized food operations by providing rent-free space and equipment or cash.

B. *Possibility of Profit.* Although the Court below suggested that this case was different from the other decided cases because of the possibility of profit by the Company, such a possibility was, obviously, present in *McCall Corp.* v. *NLRB, supra,*

4. The Administrative Law Judge stated:

"It is unnecessary, in my opinion, to have discussed [*Westinghouse, McCall, Package Machinery* and *Ladish*] in greater detail for it is beyond question that in-plant food prices are a mandatory subject of bargaining on the basis of the . . . Board decisions. It seems equally clear that such prices are not a required subject of bargaining if the . . . court decisions be controlling. The present case is therefore not one that requires in-depth analyses of the cases and underlying theory" (App. B, p. A43).

where the employer controlled the entire food operation. In any event, the mere possibility that unprofitable operations might become profitable should not be significant.

C. *Prior Bargaining.* The reliance placed by the Court below on prior bargaining between the parties over certain aspects of the food service operation simply ignores this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.,* 404 U. S. 157, 187 (1971), that "[b]y once bargaining and agreeing on a permissive subject, the parties . . . do not make the subject a mandatory topic of future bargaining." Thus, the Company's prior bargaining with the Union about certain aspects of the in-plant food service cannot, as a matter of law, serve to distinguish this case from the other cited decisions.

D. *Lack of Viable Alternative.* As in *Westinghouse Electric Corp.* v. *NLRB, supra,* and *NLRB* v. *Ladish Co., supra,* the Company's employees had, and many utilized, the alternative of bringing food into the plant rather than purchasing it from the cafeteria or vending machines. For example, during the boycott, most employees brought their lunches (App. B, p. A40).

E. *Boycott.* The mere fact that certain employees were disturbed enough by the price increase to boycott the food services cannot convert those prices into subjects of mandatory bargaining. As this Court held in *Pittsburgh Plate Glass, supra,* and in *Fibreboard Paper Products Corp., supra,* the Act establishes a limited list of mandatory bargaining subjects. That list cannot be expanded simply because certain employees are interested enough to undertake some form of economic action or, for that matter, file an unfair labor practice charge.

F. *Number of Unions Involved.* That the Company would be obligated to bargain with only one union on food prices, a fact on which the Court below placed some reliance, cannot expand the scope of the Act's mandatory bargaining requirements. Obviously, the statutory obligation to bargain does not depend on the number of unions involved.

In sum, the efforts of the Court below to distinguish this case from the decisions of the First and Fourth Circuits and its earlier decision in *NLRB* v. *Ladish Co., supra,* are unavailing. This case presents the same issue as was considered in those cases and reaches the opposite conclusion.

II. This Case Presents Questions of Substantial and Recurring Importance in Collective Bargaining and Therefore Is Appropriate for Decision by This Court

The novel and difficult character of the issues presented in this case is evidenced not only by the split that now exists in the Circuits but also by the conflict between the Seventh Circuit's decision in this case and its prior decision in *NLRB* v. *Ladish Co., supra.* Furthermore, notwithstanding the previous repeated reversals by the Courts of Appeals, the Board has zealously adhered to the principle that bargaining about food prices is required by the Act. The resulting uncertainty about whether prices for in-plant food services are or are not subject to mandatory bargaining is detrimental to the development and maintenance of stable collective bargaining relationships.

As the Board pointed out in *Ladish Co.,* 219 NLRB 354 (1975), *enf. denied,* 538 F. 2d 1267 (1976), many employers provide food services for employees.[5] The Court below treated

5. The Board stated:

"In a recent survey, 54 percent of the responding companies provided food services for employees in a lunchroom with vending machines. Employee cafeterias are provided in 43 percent of all companies. Vending machines (but not in a lunchroom) are provided by 25 percent of the companies, and lunchrooms with snack bar service are provided in 15 percent. Because the services vary from one company location to another and respondents were asked to check any of the services provided, the percentages add to more than 100. The extended use of vending machines is shown by a survey made by the Field Research Division of the Paper Cup & Container Institute, New York. Of 1,264 plant officials who replied to the survey, better than 8 of 10 are using vending machines, with over 1 of 5 depending entirely upon automatic vending. 4 Labor Policy and Practice, 245: 201-203. See also data and conclusions cited in fn. 30 of the Administrative Law Judge's Decision in *McCall Corporation, supra.*" (219 NLRB at 357, n. 27)

the subject as controlled by the details of each case and, in particular, by the distinctions discussed above. The tenuous nature of those distinctions, singly or in combination, necessarily leaves employers at whose facilities in-plant food services are provided uncertain about whether bargaining as to food prices is required. This uncertainty is compounded by the differences in the conclusions reached by the Circuits, and, indeed, by the different panels of the Seventh Circuit. Thus an employer—and for that matter the representative of the employees as well—must, in the absence of a determination by this Court, conjecture not only as to how much weight each combination of distinctions will be accorded but also as to which Court of Appeals or panel thereof will hear the case.

The confusion which now exists and which affects a large number of employers and employees can only be resolved by this Court.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

THEOPHIL C. KAMMHOLZ
WILLIAM W. MCKITTRICK
MICHAEL G. CLEVELAND
115 South LaSalle Street
Chicago, Illinois 60603

WILLIAM J. ROONEY
JAMES R. JACKSON
Ford Motor Company
The American Road
Dearborn, Michigan 48121
Counsel for Petitioner

Of Counsel:
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603

June, 1978.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 77-1707

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent,

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Argued January 10, 1978— Decided February 22, 1978

Before SWYGERT and SPRECHER, *Circuit Judges,* and GRANT, *Senior District Judge.**

SPRECHER, *Circuit Judge.* The question in this appeal is whether in-plant cafeteria and vending machine food prices and services are "terms and conditions of employment" under Section 8(d) of the National Labor Relations Act, as amended, or

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

materially or significantly affect or have impact upon such terms and conditions under the facts and circumstances of this case.[1]

The appeal comes here for review of an order of the National Labor Relations Board and upon the Board's cross-application for enforcement. On December 1, 1976, an Administrative Law Judge issued his decision recommending that the complaint be dismissed. The Board's decision and order issued on July 11, 1977, reversed the Administrative Law Judge and concluded that cafeteria and vending machine services and prices are mandatory subjects of collective bargaining. 230 NLRB No. 101 (1977).

I

The petitioner, Ford Motor Company (Company), operates an automotive parts stamping plant in Chicago Heights, Illinois, where it employs approximately 3600 hourly-rated production employees working in three shifts and represented by the intervenor, Local 588 of the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (Union). The Company and Union have been parties to a series of national collective bargaining agreements supplemented by local agreements. There is no other union in the plant.

The Company provides its employees with two air-conditioned cafeterias seating a total of 450-600 persons and five air-conditioned and enclosed vending machine areas, called "coke cribs," with a total seating capacity of 235-300 persons. All employees have a 30-minute lunch period. The parties agreed that it was not feasible for employees to leave the plant during their food breaks. Mobile food vending trucks are not permitted on plant property.

Employees are permitted to bring their own food into the plant and it may be eaten in the cafeteria or coke crib areas. However, the food brought in may only be stored in ventilated

1. 29 U. S. C. § 158(d).

but not air-conditioned locker rooms. The employees have no refrigeration facilties and in the summer months the lockers become "very hot and sticky and smelly" with temperatures frequently ranging from 80 to 100 degrees and causing food spoilage. The Company has occasionally employed exterminator services because of unsanitary conditions in the locker rooms.

Based on physical counts of usage, it appeared that assuming a normal 5-day workweek, about 20-30% of the employees used the Company cafeterias each day and, assuming that all employees used the vending machines, each employee used vending machines about 3½ times per day.

The two cafeterias and five vending machine areas are serviced by a caterer, ARA Services, Inc., under a contract with the Company dated February 11, 1972, which provides that ARA shall:

> furnish products of quality in accordance with purchasing specifications that shall have been submitted to and approved by Ford, and in accordance with a price and portion list for said manual food service and vending machines that shall have been submitted to Ford and that shall be subject to review at the request of Ford or contractor.

Under the agreement the Company furnishes rent-free space, rent-free equipment (except the vending machines), all needed utilities and maintenance whereas ARA furnishes the vending machines, all food and beverages, and management and labor. The agreement further provides that ARA shall be reimbursed for all direct costs of food and vending operations plus an allowance of general administrative costs equivalent to 4% of net receipts plus a service fee of 5% of net receipts. If gross receipts are less than the sum of the costs of the operation plus the service fee, the Company is obligated to reimburse ARA for the deficit by an annual amount not to exceed $52,000. For all recent years, the operation has been on a loss basis and the Company has made up the annual loss to ARA. Finally, the agreement provides that ARA is an independent contractor and

that the contract is terminable by either party upon 60 days written notice.

Beginning with a letter dated October 29, 1967, from the Company to the Union entitled "Improved Vending and Cafeteria Service," the parties have bargained over various aspects of the quality of service provided by the caterer (at that time a predecessor of ARA). The 1967 letter provided in part that:

> The Company recognizes *its* continuing responsibility for the satisfactory performance of the caterer and for providing the Union with a means for registering and expeditious handling of complaints concerned with such performance.

The letter, which was incorporated into the 1970 local collective bargaining agreement, dealt with the staffing of service lines, adequate cafeteria supervision, certain sanitary conditions, restocking and repairing of vending machines, and menu variety.

The local agreement in effect during the material times involved in this case became effective June 20, 1974, and continued through September 1976. The 1974 agreement included the above "recognition" clause in slightly modified language and other provisions dealing with cafeteria and vending services.[2]

2. 1. CAFETERIA SERVICE

The company assures the Union that steam table items will be available at all times during the regular lunch period and that a comparable selection of entrees, salads and desserts will be available during all regular lunch periods. In addition, the Company will make arrangements for a delicatessen type sandwich service in the cafeteria. Cafeteria supervision will be available during all lunch periods to ensure that employees will be served in a reasonable length of time through the main serving lines as well as to provide for the adequacy of food service, condiments and utensils.

2. VENDING SERVICE AND VARIETY

To assure that vending machines will receive prompt servicing in the event of a mechanical breakdown, a sticker will be affixed to each machine indicating the number to call for repair. Further, the Company assures the Union that a greater variety of selections will be maintained in the existing vending machines

(Footnote continued on next page.)

The Company has consistently refused to bargain with the Union concerning prices set by ARA with its approval. The present controversy developed when the Company informed the Union that cafeteria and vending machine prices would be increased on February 9, 1976. By a letter to the Company dated February 13, the Union sought "to bargain with you regarding [cafeteria and vending] prices and services." On February 18, the Company responded by letter stating that "[s]imilar requests have been made by the Union in the past, and the Company's response has been the same, that food prices and services are not a proper subject for negotiations."[3]

Beginning on February 16, 1976, there was a boycott by Union members of the cafeteria and vending operations, which ended as to the cafeteria on May 19, 1976, and as to vending machines on June 7, 1976. The Administrative Law Judge found that "a substantial reason for abandoning the boycott was its ineffectiveness in reducing prices." He also noted that employees mostly brought in their lunches during the boycott and its termination was due in part to the onset of hot weather with consequent problems of spoilage of food.

Meanwhile on April 12, 1976, the Union had filed an unfair labor practice charge against the Company. On May 26, 1976,

(Footnote continued from preceding page.)

and that the quality of such items will continue to meet Company standards.

The Company recognizes its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance.

3. By letter of March 23, 1976, the Union requested from the Company information regarding cafeteria and vending machine operations, including the Company's maintenance responsibilities, profits from food operations, control of prices and contractual relations with the caterer. On April 9, the Company denied the Union's request for information. Most if not all the information requested was disclosed in the proceedings before the Board. The Board found and concluded that the requested information was relevant to food prices and services, and that its disclosure was necessary to the Union's fulfilling its duty as a bargaining agent.

the Regional Attorney for the Board's General Counsel for Chicago issued a complaint against the Company. Our jurisdiction is derived from Sections 10(e) and (f) of the Act as amended (29 U. S. C. § 160), the alleged unfair labor practices having occurred in Illinois.

II

As early as 1949, the National Labor Relations Board held that an employer had a statutory duty to bargain regarding the prices of meals served at logging camps. *Weyerhaeuser Timber Co.*, 87 NLRB 672 (1949). Through the years the Board has persisted in its position that in-plant cafeteria and vending machine food prices and services are terms and conditions of employment and hence mandatory subjects of bargaining. *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966); *McCall Corp.*, 172 NLRB 540 (1968); *Package Machinery Co.*, 191 NLRB 268 (1971); and *Ladish Co.*, 219 NLRB 354 (1975).

These last four cases were all reversed by courts of appeals. *Westinghouse Electric Corp.* v. *N. L. R. B.*, 369 F. 2d 891 (panel decision), 387 F. 2d 542 (supervening en banc decision, 4th Cir. 1967); *McCall Corp.* v. *N. L. R. B.*, 432 F. 2d 187 (4th Cir. 1970); *N. L. R. B.* v. *Package Machinery Co.*, 457 F. 2d 936 (1st Cir. 1972); and *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d 1267 (7th Cir. 1976).

The Board takes the view that an Administrative Law Judge's duty is to apply established Board precedent which the Supreme Court of the United States or the Board itself has not reversed, despite reversals of Board precedent by courts of appeals. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963). In the present case, the Administrative Law Judge reasoned that despite the Board's precedents in *Westinghouse, McCall, Package Machinery* and *Ladish*, the reversals of those cases by courts of appeals followed by the failure of the Board to seek certiorari from the Supreme Court in the most recent case, *N. L. R. B.* v. *Ladish*

Co., 538 F. 2d 1267 (7th Cir. 1976), indicated that the Board had acquiesced and changed its former position. The Administrative Law Judge therefore recommended that the complaint against Ford Motor Company be dismissed.

The Board rejected the Administrative Law Judge's reasoning and said that "[w]ith all due respect to the First, Fourth, and Seventh Circuits, we adhere to our position that cafeteria and vending machine prices are a mandatory subject of bargaining." 230 NLRB No. 101 (1977).

III

Section 8(a)(5) of the National Labor Relations Act, as amended,[4] makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees. . . ." Collective bargaining is defined in Section 8(d) as:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .[5]

4. 29 U. S. C. § 158(a)(5).

5. 29 U. S. C. § 158(d). The original National Labor Relations Act of 1935 (the Wagner Act) did not contain a definition of collective bargaining, but Section 9(a) provided that a majority union shall be the exclusive representative of all employees in an appropriate unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or *other conditions of employment* . . ." (Emphasis added.) When the Labor Management Relations Act of 1947 (the Taft-Hartley Act) substantially amended the National Labor Relations Act, Section 9(a) was left unchanged and Section 8(d) was first included. The parties to this case have not directed our attention to, nor has our own research located, any legislative history which would be particularly persuasive in an attempt to give further content to the phrase "terms and conditions of employment" in Section 8(d) or "conditions of employment" in Section 9(a). *See* Legislative History of the Labor Management Relations Act, 1947 (G. P. O., 1948), Vols. I and II. Possibly the only assistance in interpreting these phrases which the history affords is summarized by Mr. Justice Stewart in his concurring opinion in *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 at 220-221 (1964).

The Supreme Court decision giving definitive substance to the words "terms and conditions of employment" is *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 (1964). Inasmuch as what may be the key message of *Fibreboard* seems to have been overlooked or at least summarily considered in subsequent cases, it is crucial to the outcome of this case to examine Mr. Chief Justice Warren's opinion for the Court and Mr. Justice Stewart's concurring opinion in some detail.

The Court's *Fibreboard* opinion goes to great pains to emphasize that each categorization of what is or is not a term or condition of employment or what has or has not sufficient effect or impact upon a term or condition so as to convert it into a mandatory subject of bargaining, must depend upon the facts and circumstances of each case. At the outset of the opinion, the Court said at 209:

> We agree with the Court of Appeals, that, *on the facts of this case*, the "contracting out" of the work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively.
> (Emphasis added.)

At the end of the portion of the opinion dealing with this subject,[6] the Court said at 215:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

6. In the middle of the opinion the Court said that "[t]he *facts of the present case* illustrate the propriety of submitting the dispute to collective negotiation." (Emphasis added.) 379 U. S. at 213.

The Stewart concurrence expanded further on the same theme[7] at 218:

> The question posed is whether *the particular decision* sought to be made unilaterally by the employer *in this case* is a subject of mandatory collective bargaining within the statutory phrase "terms and conditions of employment." *That is all the Court decides.* The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. *The Court holds no more than that this employer's decision* to subcontract this work, involving "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment," is subject to the duty to bargain collectively. *Within the narrow limitations implicit in the specific facts of this case,* I agree with the Court's decision.
> (Emphasis added.)

Even as all "contracting out" situations are not necessarily either mandatory bargaining subjects or not mandatory bargaining subjects, not all in-plant cafeteria and vending machine food prices and services are necessarily one or the other. What is peculiarly and particularly a question of fact should not be converted into a matter of law, as *Fibreboard* strained to make clear. Having done this, Mr. Justice Stewart then sought to establish some guidelines for making the factual distinction. While much of his concurrence is applicable only to "contracting out" situations, some of his observations are applicable generally.

For example, he gave recognition to the standard that a particular matter may be either a term or condition of employment or may affect or have such an impact upon a term or

7. More recently, in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 179 (1971), the Supreme Court held that "*in each case* the question is . . . whether [a particular matter] vitally affects the 'terms and conditions' of . . . employment."

condition that it nevertheless becomes a mandatory subject of bargaining. At the same time he limited that standard as not encompassing all matters which have an "effect-impact." He said at 223:

> While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may *affect* job security is a subject of compulsory collective bargaining.
>
> * * * * *
>
> In many of these areas the *impact* of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." (Emphasis added.)

Mr. Justice Brennan, writing for the Court in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 179 (1971), said "[w]e agree with the Board that the principle of . . . *Fibreboard* is . . . whether [a particular matter] vitally affects the 'terms and conditions' of . . . employment.

Based principally upon the Stewart concurrence in *Fibreboard*, the courts of appeals have sought to further develop the standard for determining whether a particular matter "affects" or "has an impact upon" a term or condition of employment. Some courts have limited the "effect-impact" test by requiring a "material" or "significant" effect or impact (*see Seattle First National Bank* v. *N. L. R. B.*, 444 F. 2d 30, 33 (9th Cir. 1971)), or a "substantial adverse effect" upon the employees (*see District 50, United Mine workers* v. *N. L. R. B.*, 358 F. 2d 234, 237 (4th Cir. 1966).[8]

8. As applied to in-plant cafeteria and vending machine food prices and services *see Westinghouse, supra* 387 F. 2d at 548 (". . . a significant or material relationship to wages, hours, or other conditions of employment") and *McCall, supra* 432 F. 2d at 188 ("whether the issue 'materially affects the conditions of employment' ") (Sobeloff, J., dissenting).

IV

Applying the *Fibreboard* principles to the case at hand will perhaps be simpler if we first determine how they have been applied in this circuit generally and in this and other circuits specifically to in-plant feeding.

This court adopted the case-by-case approach in interpreting the analogous phrase "working conditions" in the Railway Labor Act,[9] holding that "["t]he Act does not fix or authorize anyone to fix generally applicable standards for working conditions . . . ." *In re Chicago North Shore & M. R. Co.*, 147 F .2d 723, 727 (7th Cir.) *cert. denied*, 325 U. S. 852 (1945).

In *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d 1267, 1272 (7th Cir. 1976), the Court said that "[w]e hold that vending machine food prices are not a material or significant condition of employment *at Ladish*" (emphasis added). Furthermore, the opinion of Judge Pell, which relies upon *Fibreboard* and upon *Seattle First National Bank* v. *N. L. R. B., supra*, makes it clear that the Court is applying the material or significant effect or impact standard rather than what may seem to be an entirely different standard of "material or significant condition," which, of course, would be contrary to the statute itself.[10]

The result in the *Ladish* case and the seemingly contrary dicta in *Inland Steel Co.* v. *N. L. R. B.*, 170 F. 2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U. S. 960 (1949), that "a provision for in-plant feeding . . . could properly be designated as 'wages,' and . . . [is one of the] 'conditions of employment,' are easily

9. Section 2, First of the Railway Labor Act provides that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and *working conditions* . . . ." (Emphasis added.) 45 U. S. C. § 152, First.

10. 29 U. S. C. § 158(d) makes terms and conditions of employment mandatory subjects of collective bargaining, whether material or significant or not. *Fibreboard* expanded the plain meaning of the statute to include matters having material or significant effect or impact upon terms or conditions.

reconciled on this basis, namely, that this circuit applies the case-by-case approach and the standard of review of material or significant effect or impact upon a term or condition of employment.

In two of the other three in-plant food cases, the case-by-case approach was used. *Westinghouse, supra* 387 F. 2d at 547 (". . . it appears that the Supreme Court's decision in *Fibreboard* was limited to a particular situation . . . ."); *McCall, supra* 432 F. 2d at 187 (*Westinghouse* was decided "under the circumstances of the case"). Nothing was said in this regard in *Package Machinery, supra,* which relied heavily, however, on *Westinghouse* and *McCall.* Both *Westinghouse* and *McCall* also applied the standard of review of material or significant effect or impact. *See* footnote 8, *supra.*

Finally, in the closely-analogous cases determining whether company-furnished housing is a term or condition of employment, courts have held that the result depends upon an evaluation of the relevant facts of the particular case. *See American Smelting & Refining Co.* v. *N. L. R. B.,* 406 F. 2d 552, 553-554 (9th Cir.), *cert. denied,* 395 U. S. 935 (1969).

Whether in-plant cafeteria and vending machine food prices and services are a term or condition of employment is a close and difficult question.

Mr. Justice Stewart, concurring in *Fibreboard Corp.* v. *N. L. R. B.,* 379 U. S. 203, 222 (1964), said that "[i]n common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment" and "[w]hat one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment." The food one must pay for and eat as a captive customer within the employer's plant can be viewed as a physical dimension of one's working environment.

Ladish itself recognized that some aspects of in-plant feeding are terms and conditions of employment. The Court there noted

that "[t]he Company does not dispute that it is required to bargain over hours of employment, including the lunch period." 538 F. 2d at 1271. This Court, in *Ladish,* however, distinguished "the vague dicta in *Inland Steel,* which in any event could mean nothing more than the obvious requirement that a company would have to bargain on some phases of 'in-plant feeding,' *e.g.* the time for the purpose." *Id.* at 1272.

The following analogous matters have been held to be terms or conditions of employment and hence mandatory subjects of collective bargaining:

> *Safety rules and practices—N. L. R. B.* v. *Gulf Power Co.,* 384 F. 2d 822, 825 (5th Cir. 1967).
>
> *Rules concerning employee discipline, smoking and dress—S. S. Kresge Co.* v. *N. L. R. B.,* 416 F. 2d 1225, 1229-1230 (6th Cir. 1969).
>
> *Rental rate for company-furnished housing—American Smelting & Refining Co.* v. *N. L. R. B.,* 406 F. 2d 552 (9th Cir.), *cert. denied,* 395 U. S. 935 (1969); *N. L. R. B.* v. *Lehigh Portland Cement Co.,* 205 F. 2d 821 (4th Cir. 1953).
>
> *Gas price discount for employees—N. L. R. B.* v. *Central Illinois Public Service Co.,* 324 F. 2d 916 (7th Cir. 1963).
>
> *Level of heat in plant—N. L. R. B.* v. *Washington Aluminum Co.,* 370 U. S. 9 (1962).

But despite the fact that we are dealing with a close question, we accept, as we must in the absence of *en banc* consideration, the holding of *Ladish,* which we interpret to mean that under the facts and circumstances *Ladish* in-plant vending machine food prices were not a term or condition of employment.

We hold, however, that under the facts and circumstances of this case, in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact

upon terms and conditions of employment, and therefore are mandatory subjects of bargaining.

The facts and circumstances of this case (set forth in Part I) differ from those in *Ladish, Westinghouse, McCall* and *Package Machinery* as summarized in chart form as follows:

	Ford	Ladish	Westinghouse	McCall	Package
Number of Unions	1	7	3	Several	1
Subsidization					
Rent-free space	Yes	Yes	Yes	Company-operated	Yes
Rent-free equipment	Yes	No	Yes		Yes
Utilities	Yes	Yes	Yes		Yes
Maintenance	Yes	No	Yes		Yes
Cash (per year)	$52,000	No	$1800 once		$8940
Employer Control					
Prices	Yes	No	Yes	Yes	Yes
Food quality	Yes	No	Yes	Yes	Yes
Use of Facilities					
Cafeteria	20-30%	None	40-45%	No evidence	50%
Vending machines	3½ per day	70%	Not at issue	25-95%	98%
Time for Lunch	30 mins.	15 mins.	30-45 mins.	10-30 mins.	20-30 mins.
Alternatives					
Outside restaurant	Inadequate	Not allowed	Inadequate	Adequate	Several
Paper-bagging	Not feasible	30%	55-60%	Some	Yes
Mobile vendors	Not allowed	Not allowed	Yes	Yes	No evidence
Attempted Boycott	Failed	None	None	None	None
Prior Bargaining	Since 1967	None	None	None	None

We continue to operate under the constraints of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488 (1951), which referred to the National Labor Relations Board "as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." The Board made the following distinctions between the present case and *Ladish:*

> Unlike *Ladish,* where the respondent had no input on prices, the Respondent in this case retains influence over cafeteria and vending machine prices by its right to review prices and its leverage of the subsidy agreement. In addition, there also exists the possibility for the Respondent to make a profit on the food service operation. Also, since 1967, the parties in this case have bargained over in-plant food services. No such bargaining history was present in *Ladish*. Moreover, in *Ladish,* the court implied that "brown-bagging" is a viable alternative to purchasing lunch from the commercial food service. However, in this case, employees have complained about spoilage of food stored in their lockers until lunch, as well as unsanitary conditions in the locker room (wherein the Respondent has found it necessary on occasion to exterminate). Additionally, the employees have apparently been so concerned with the food pricing that over half of them participated in a boycott of the Respondent's food service operations. There was no such labor strife involved in *Ladish*. Lastly, in *Ladish* the employees were represented by seven unions. The court therein projected that each time the food prices were raised "the Company could be compelled to engage in seven rounds of negotiations." 538 F. 2d at 1272. This fact, the court declared, "provides a good example of a situation in which bargaining could be both disruptive of stable relations and economically wasteful." *Id.* In the instant case, however, the employees are represented by a single union. While we adhere to the view that the number of unions representing employees at a single plant is not a factor in resolving this issue, we nevertheless note that, even in the court's view, there is no potential for conflicting union demands in this case.

We agree with the Board that the distinctions which it has found are material and significant, that those distinctions have an effect and impact upon terms and conditions of employment, and that therefore, in-plant cafeteria and vending machine food prices and services are mandatory subjects of bargaining under the facts and circumstances of this case.

This result will not be unduly burdensome to the Company. The obligation to bargain upon terms and conditions of employment "does not compel either party to agree to a proposal or require the making of a concession." 29 U. S. C. § 158(d). The order we are enforcing does not require the Company to bargain about every proposed price change in food prices before putting such change into effect but "to bargain on such price change only after . . . [it is] determined unilaterally and upon a request of the Union."

The Board's order of July 11, 1977, is enforced and the Company's petition for review as denied.

APPENDIX B

230 NLRB No. 101

FPM
D—2635
Chicago Heights, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FORD MOTOR COMPANY (Chicago Stamping Plant)	
and	Case 13—CA—15340
LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA	

DECISION AND ORDER

On December 1, 1976, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting brief and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent Ford Motor Company (hereinafter called Respondent), at its Chicago Stamping Plant, refused to bargain and supply information to Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter called Union), in regard to the plant's vending machine and cafeteria prices and services. The Administrative Law Judge found that, on the basis of the Board's decisions, in-plant food prices are a mandatory subject of bargaining. However, he nevertheless found that the Board's action in failing to seek review of the Seventh Circuit's reversal of *Ladish*,[2] to the latest Board decision in this area, considered in light of other reviewing courts' refusal to uphold Board decisions in this area (see *infra*), was a decision to hold that in-plant food prices are not a mandatory subject of bargaining.[3] Accordingly, he concluded that the Respondent did not violate Section 8(a)(5) and (1) by refusing to bargain about such prices and by not supplying the requested information in connection therewith. We disagree on all counts.

The facts are not in dispute and may be summarized as follows: The Respondent provides its employees with two air-conditioned cafeterias and five air-conditioned vending areas (or coke cribs). The cafeteria and vending areas are serviced by ARA Services pursuant to a 1972 agreement with the Respondent. Under the agreement, ARA furnishes food and machines. Section 2(d) of the contract states that ARA shall:

> furnish products of quality in accordance with purchasing specifications that shall have been submitted to and approved by Ford, and in accordance with a price and portion

1. The General Counsel has made a motion to correct the transcript and states that all parties agree to the corrections. In the absence of any opposition thereto, the motion is hereby granted.

2. 219 NLRB 354 (1975), enforcement denied 538 F. 2d 1267 (C. A. 7, 1976).

3. The Administrative Law Judge did not discuss the allegations that Respondent refused to bargain as to services.

list for said manual food service and vending machines that shall have been submitted to Ford and that shall be subject to review at the request of Ford or Contractor.

Section 3(a) of the agreement provides that ARA be reimbursed for all direct costs of the food and vending operations along with a surcharge consisting of an allowance for general administrative costs equivalent to 4 percent of net receipts and a service fee of 5 percent of net receipts. Should the receipts exceed cost plus the 9 percent surcharge, the excess funds shall be returned to the Respondent. When revenues do not exceed the costs of the operation plus the service fee, the Respondent is obligated to subsidize ARA, and in recent years, at times, has had to do so. The agreement further states that the contract is terminable by either party upon 60 days' notice.

Although Respondent has at all times refused to bargain as to the prices set by ARA with its approval, it has in the past bargained over the quality of services provided by that caterer. Since 1967, the local contract has included provisions dealing with vending and cafeteria services. The contracts have covered the staffing of service lines, adequate cafeteria supervision, restocking and repairing vending machines, and menu variety. The 1974 local agreement also states, "The Company recognized its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance."

Employees have a 30-minute lunch period and two 22-minute rest periods. They are not allowed to leave the plant during the 22-minute breads, and it is not feasible for them to leave during the lunch period. Mobile food vending trucks are not permitted on plant property and are not usually available outside the plant gate. Only an extremely small number of employees (approximately 12 of the 3,600) actually leave the plant during the lunch period.

Employees are permitted to bring their own food into the plant. However, the food must be stored in personal lockers.

These lockers are located in rooms which are ventilated but not air-conditioned. There are no refrigeration facilities. During the summer months, the rooms become very hot (temperatures reaching between 80 to 100 degrees) and sticky, and employees have complained about food spoilage. The Respondent has had occasion to use exterminator services upon complaints as to santiary conditions in the locker room.

On February 6, 1976, the Respondent informed the Union that cafeteria and vending machine prices would be increased by an unspecified amount on February 9. The Respondent refused the Union's request to discuss the increase first, and on February 9 the prices were increased from 5 to 10 cents an item. On February 13, the Union sent the following letter to the Respondent's industrial relations manager, Brown, asking to bargain about prices and services:

Dear Mr. Brown:

As the certified Bargaining Agent for your Production and Maintenance Employees, Local 588 is concerned about prices and services in cafeteria and vending operations. We would like to bargain with you regarding these prices and services.

As you know this is a subject of great concern. Good food at reasonable prices is considered to be a condition of employment by our members. If we discuss this properly, we may be able to reach full agreement prior to opening negotiations for a new contract.

Sincerely,

RICHARD W. MARCO

The Respondent responded to the letter on February 18:

Dear Mr. Marco,

This letter is in response to your letter dated February 13, 1976, requesting to meet with the Company for the purpose of negotiating prices and services provided by A.R.A. food service.

Similar requests have been made by the Union in the past, and that Company's response has been the same, that

food prices and services are not a proper subject for negotiations. Appropriately, your request is denied.

T. M. BROWN

In the meantime, the Union, on February 16, 1976, began a boycott of the food services operations and over half of the employees participated. The boycott lasted over a month, but did not result in any changes in the prices. On March 23, 1976, the Union requested information concerning the Respondent's role in cafeteria and vending operations in order to administer the existing contract and to prepare for upcoming negotiations. The Respondent declined.

The Administrative Law Judge correctly found—and the Respondent concedes in its brief—that the present case falls within the factual and legal context of the Board's decisions in *Westinghouse Electric Corporation*,[4] *McCall Corporation Package Machinery Company*,[6] and *Ladish*,[7] and that on the basis of these decisions in-plant food prices are a mandatory subject of bargaining. Had he followed the principles established in such cases, therefore, he necessarily would have found, as we do, that Respondent violated 8(a)(5) and (1) when it refused to bargain about such matters. However, as previously indicated, the Administrative Law Judge, relying on the First,[8] Fourth,[9] and Seventh,[10] Circuits' reversal of the Board's finding of a violation in the above-mentioned cases, coupled with the Board's failure to seek certiorari in *Ladish*, erroneously found that the Board has since decided that in-plant food prices are

4. 156 NLRB 1080 (1966).

5. 172 NLRB 540 (1968).

6. 191 NLRB 268 (1971).

7. 219 NLRB 354 (1975).

8. *Package Machinery Company* v. *N. L. R. B.*, 457 F. 2d 936 (C. A. 1, 1972).

9. *Westinghouse Electric Corporation* v. *N. L. R. B.*, 387 F. 2d 542 (C. A. 4, 1967); *McCall Corporation* v. *N. L. R. B.*, 432 F. 2d 187 (C. A. 4, 1970).

10. *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d 1267 (C. A. 7, 1976).

not a mandatory subject of bargaining and hence there was no violation in Respondent's refusal to bargain about them.

With all due respect to the First, Fourth, and Seventh Circuits, we adhere to our position that cafeteria and vending machine prices are a mandatory subject of bargaining.[11] Nor does the Board's failure to seek certiorari in those cases indicate an abandonment of its position that in-plant food prices are a mandatory subject of bargaining, and any assumptions to the contrary are totally unfounded and unwarranted.[12] Accordingly,

11. We note that the instant case, on its facts, is in many respects a stronger case than *Ladish* for adhering to our position. Unlike *Ladish*, where the respondent had no input on prices, the Respondent in this case retains influence over cafeteria and vending machine prices by its right to review prices and its leverage of the subsidy agreement. In addition, there also exists the possibility for the Respondent to make a profit on the food service operation. Also, since 1967, the parties in this case have bargained over in-plant food services. No such bargaining history was present in *Ladish*. Moreover, in *Ladish*, the court implied that "brown-bagging" is a viable alternative to purchasing lunch from the commercial food service. However, in this case, employees have complained about spoilage of food stored in their lockers until lunch, as well as unsanitary conditions in the locker room (wherein the Respondent has found it necessary on occasion to exterminate). Additionally, the employees have apparently been so concerned with the food pricing that over half of them participated in a boycott of the Respondent's food service operations. There was no such labor strife involved in *Ladish*. Lastly, in *Ladish* the employees were represented by seven unions. The court therein projected that each time the food prices were raised "the Company could be compelled to engage in seven rounds of negotiations." 538 F. 2d at 1272. This fact, the court declared, "provides a good example of a situation in which bargaining could be both disruptive of stable relations and economically wasteful." *Id.* In the instant case, however, the employees are represented by a single union. While we adhere to the view that the number of unions representing employees at a single plant is not a factor in resolving this issue, we nevertheless note that, even in the court's view, there is no potential for conflicting union demands in this case.

12. By relying on U. S. Court of Appeals' decisions which are contrary to applicable Board precedent, the Administrative Law Judge in this case has committed an error. It is not for an Administrative Law Judge to speculate as to what course the Board should or would follow where a circuit court has expressed disagreement with the Board's views. That is the province of the Board alone. It

(Footnote continued on next page.)

we find that Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain about the price increases it placed into effect.

We further find that Respondent violated the same sections of the Act by also refusing to bargain about the food services provided by it through a contract with ARA. The Respondent acknowledge that certain aspects of food services are mandatory subjects of bargaining and that the 1974 contract between itself and the Union contained provisions concerning food services.[13] Respondent, however, argues that it has not refused to bargain about the food services provided here. We find no basis in the record to support that argument. To the contrary, the Respondent in its denial of the Union's request to bargain about the food prices and services, *supra,* stated, 'food prices and services are not a proper subject for negotiations." We cannot imagine a more explicit refusal to bargain. Nor is there any evidence that bargaining about such service occurred, or that Respondent, its stated refusal to the contrary, stood ready or attempted to bargain about food services. Accordingly, we find that Respondent refused to bargain about the food services provided its employees.

The Union also requested information about the Respondent's role in the cafeteria and vending machine operations in order to police the existing contract and to prepare for bargaining.

(Footnote continued from preceding page.)
remains the Administrative Law Judge's duty to apply established Board precedent which the Supreme Court or the Board has not reversed. *Iowa Beef Packers, Inc.,* 144 NLRB 615, 616 (1963); *Novak Logging Company,* 119 NLRB 1573, 1575-76 (1958); *The Prudential Insurance Company of America,* 119 NLRB 768, 773 (1957).

13. The Board and the courts have found a wide variety of subjects to be material conditions of employment falling within the scope of compulsory bargaining. Among such conditions are in-plant feeding, *Inland Steel Company* v. *N. L. R. B.,* 170 F. 2d 247 (C. A. 7, 1948); improvements in lunchroom equipment and supplies, *Preston Products Company, Inc.,* 158 NLRB 452 (1966); the scheduling of coffeebreaks, and providing the service of free coffee, *Fleming Manufacturing Company,* 119 NLRB 452 (1967).

We have found that food prices and services are mandatory subjects of bargaining. The requested information is clearly relevant to those subjects and hence is necessary to the Union's fulfilling its duty as a bargaining agent also to those matters.[14]

The Remedy

Having found that the Respondent has unlawfully refused to bargain and supply information to the Union concerning food prices and services, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. As we held in *Westinghouse Electric Corp., supra,* "It is sufficient compliance with the statutory mandate . . . if management honors a specific union request for bargaining about changes made or to be made." 156 NLRB at 1081. Accordingly, as in *Westinghouse,* our order will not require the Respondent "to bargain about every proposed price change in food prices before putting such change in effect." we will require the Respondent to bargain on such price change only after they are determined unilaterally and upon a request of the Union.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (17) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been and is the exclusive representative of all employees in the following unit within the meaning of Section 9(a) of the Act:

> All production and maintenance employees in the Respondent's facility at Chicago Heights, Illinois, but excluding general office employees and clerical employees other than shipping and receiving clerks, employees in the Industrial Relations and methods and work standards department,

14. *N. L. R. B.* v. *Acme Industrial Co.,* 385 U. S. 432 (1967).

employees engaged in designing, drafting, laboratory, photographic and other technical, experimental and/or research work, cafeteria and dining room employees, plant protection and fire department employees, guards, professional employees, foremen, trainee foremen and all other supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing, on and since February 18, 1976, to bargain collectively with the Union as the exclusive representative of its employees in the afore-said bargaining unit, concerning plant vending machine and cafeteria services and price changes, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. By refusing, on and since February 18, 1976, to bargain and to supply the information requested by the Union concerning the Respondent's role in the cafeteria and vending machine operation, which information is necessary for the Union's performance of its duty as exclusive bargaining agent, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ford Motor Company, Chicago Heights, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing, upon request, to bargain collectively with Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America, as the exclusive bargaining representative of its employees in the following appropriate unit with respect to food services and changes in food prices in the vending machines and cafeteria:

All production and maintenance employees in the Respondent's facility at Chicago Heights, Illinois, but excluding general office employees and clerical employees other than shipping and receiving clerks, employees in the Industrial Relations and methods and work standards department, employees engaged in designing, drafting, laboratory, photographic and other technical, experimental and/or research work, cafeteria and dining room employees, plant protection and fire department employees, guards, professional employees, foremen, trainee foremen and all other supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) Refusing, upon request, to supply the aforesaid labor organization with the information necessary for collective bargaining, in relation to its role in the cafeteria and vending machine operation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to food services and any changes, now in effect or hereafter made or proposed, in food prices charged employees in the vending machines and cafeterias.

(b) Upon request, supply the above-named labor organization with information necessary for collective-bargaining, in relation to its part or role in the cafeteria and vending machine operations.

(c) Post at its plant in Chicago Heights, Illinois, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. July 11, 1977.

JOHN H. FANNING,
Chairman

JOHN A. PENELLO,
Member

BETTY SOUTHARD MURPHY,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

15. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America, as the exclusive representative of all our employees in the bargaining unit described below with respect to food services and changes in food prices in the vending machines and cafeterias:

> All production and maintenance employees in the Respondent's facility at Chicago Heights, Illinois, but excluding general office employees and clerical employees other than shipping and receiving clerks, employees in the Industrial Relations and methods and work standards department, employees engaged in designing, drafting, laboratory, photographic and other technical, experimental, and/or research work, cafeteria and dining room employees, plant protection and fire department employees, guards, professional employees, foremen, trainee foremen and all other supervisors as defined in the Act.

WE WILL NOT refuse to supply the above-named Union with information necessary for collective bargaining, in relation to its role in the cafeteria and vending machine operation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the above-named Union, as the exclusive representative of all our employees in the aforesaid unit with respect to food services and any changes, now in effect or hereafter made or proposed, in

food prices charged our employees in the vending machines and cafeterias.

WE WILL, upon request, supply the above-named Union with information necessary for collective bargaining in relation to its role in the cafeteria and vending machine operation.

FORD MOTOR COMPANY
(Employer)

Dated..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Bldg., Rm. 881, 219 S. Dearborn Street, Chicago, Illinois 60604, Telephone 312—353—7597.

JD-793-76
Chicago Heights, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT) and LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA *Lawrence E. Dube, Esq.*, and *Frank J. Ziegler, Esq.*, for the General Counsel. *William J. Rooney, Esq.*, Dearborn, MI, for Respondent. *Jerome Schur (Katz & Friedman)*, Chicago, IL, for the Union.	Case No. 13-CA-15340

DECISION

STATEMENT OF THE CASE

RALPH WINKLER, Administrative Law Judge: This case was heard on August 16, 1976, in Chicago, Illinois, upon a complaint issued by the General Counsel on May 16, 1976, and an answer filed by Respondent Ford Motor Company. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America intervened after the hearing, and I shall refer to it and its Local 588 collectively as the Union unless separate identification be necessary. The Company is an employer within Section 2(6) and (7) of the Act, and the International and Local 588 are labor organizations within Section 2(5) of the Act.

I. The Unfair Labor Practices

The issue

Respondent has a Stamping Plant in Chicago Heights, Illinois. The plant buildings occupy an area one-quarter mile by one-quarter mile and employ approximately 3,600 hourly-rated production employees on a three-shift operation. These employees are represented by the International Union, with Local 588 as its administrative component, and there is no other union in the plant. Collective-bargaining agreements have been operative between the parties at all material times here.

The principal issue is whether Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union concerning cafeteria and vending machine prices at the Stamping Plant. Conceding this refusal to bargain, Respondent asserts that cafeteria and vending machine prices are not "terms and conditions of employment" within Section 8(d) of the Act and, therefore, that it was under no obligation to negotiate over that subject. Whether such prices are a mandatory subject of bargaining under the Act is not a novel question. As will be discussed, Board decisions uniformly have held that it is mandatory, while those Courts of Appeals dealing with the problem have just as uniformly held otherwise.

Cafeteria and vending machine facilities

Respondent makes available to its employees certain in-plant cafeteria and vending machine services which are provided by ARA Services, Inc., pursuant to a 1972 "caterer-vending" agreement between Respondent and ARA.[1] This agreement provides, in part, that ARA will manage and operate the manual food service at the plant and install, maintain, and service the vending machines; provide all food, beverages, and materials for the

1. ARA has been providing such services since 1970. Another caterer provided similar services before that time.

operation along with necessary management and labor personnel; furnish products of quality in accordance with specifications approved by Respondent and in accordance with a price and portion list that shall also have been submitted to Respondent and that shall be subject to review at either party's request; permit Respondent to inspect all machines and equipment to determine compliance with established standards of quality and cleanliness. The agreement provides that ARA be reimbursed for all direct costs of food and vending operations along with an allowance for general administrative costs equivalent to 4 percent of net receipts and a service fee of 5 percent of such receipts. If gross receipts from the operation are less than the sum of the costs of the operation plus the service fee, Respondent is obligated to reimburse ARA for the deficit by an annual amount not to exceed $52,000. The parties stipulated in this connection that

> In some months revenues exceed costs and in some months the opposite has occurred. When revenues exceed costs, the Employer realizes income, and when costs exceed revenues a loss occurs. For all recent years, the operation has been on a loss basis and the Employer has made up the loss to ARA.

The agreement further provides that ARA is an independent contractor and that the contract is terminable by either party upon 60 days' notice.

ARA maintains two cafeterias and five vending machine areas (or coke cribs) in the plant for bargaining unit employees.[2] The larger (or "hourly") cafeteria, on the second floor of the plant, serves hot food from steam tables and also houses coin-operated vending machines which dispense beverages, hot and cold food, pastry, and candy. This cafeteria is air-conditioned and seats between 400 and 500 persons. It is open for breakfast between 5 a.m. and 8 a.m., and also during lunch periods. It is open during shift changes, as well, but only food from the vending machines is available at those times.

2. ARA also maintains an Executive dining room and a salaried cafeteria which are not available to bargaining unit employees.

The second (or "satellite") cafeteria also is air-conditioned; it accommodates 50 to 100 persons and is open for two of the three lunch periods on the day and evening shifts. This cafeteria does not have a steam table or cafeteria service; it does have approximately 12 vending machines serving hot and cold sandwiches, beverages, stews, soups, spaghetti, pastry, ice cream, and candy.

The five coke cribs, which are air-conditioned and enclosed, are scattered throughout the plant and are open during all meal and rest periods. Each of four cribs accommodates 40 to 50 persons, and the fifth between 75 and 100. The cribs have vending machines dispensing the same food items available in the satellite cafeteria.

Employees on all three shifts have a 30-minute lunch period. In addition, employees working on production lines—approximately 1,600, or approximately 50 percent of the employees on the first two shifts— have a 5-minute washup period before their lunch break and two 22-minute rest periods.

The following table[3] is a representative showing of patronage of cafeteria and vending machine services during the indicated weeks:

Week	Customer Count in all Cafeterias	Customer Count in Hourly Cafeteria	Total Plant Population	Vending Sales Unit
1. 10/12/75 through 10/18/75	6,745	5,600	4,445	96,279
2. 11/15/75 through 11/21/75	3,938	3,865	3,755	61,568
3. 1/10/76 through 1/16/76	3,947	3,873	3,750	70,560
4. 2/28/76 through 3/ 5/76	875	820	3,950	16,741

3. Page 29 of the transcript is hereby corrected to conform with the statistical data in the table. The record is also corrected to reflect the changes indicated at page 5, note 5, of the General Counsel's brief.

In the vicinity of Chicago Heights and within several miles from Respondent's plant, are more than a dozen other industrial plants employing several thousand employees. There are five short-order eating places and five sit-down restaurants within 3 miles of the plant, and some 25 establishments within 4 miles. Respondent agrees that it is not feasible, presumably because of time limitations,[4] for employees to leave the plant during their 22-minute rest breaks, and, as indicated above, their lunch period is only 8 minutes longer. Mobile food vending trucks are not permitted on plant property, and are not usually available outside the plant gate. Comparatively few employees actually leave the plant during lunch periods.

Employees are permitted to bring their own food into the plant which they may store only in their personal lockers and not in working areas. Food may only be eaten in the cafeterias or in break areas or coke cribs. The locker rooms are ventilated but not air-conditioned and employees have no facilities for refrigerating food they bring in. According to Local 588's president, Richard Marco, the locker rooms are not well ventilated and become "very hot and sticky and smelly" in summer months when area temperatures frequently range between 80 and 100 degrees and go even higher. Marco further testified to having received employee complaints concerning food spoilage resulting from locker room conditions.[5] And Respondent has had occasion to use exterminator services upon complaints from employees as to sanitary conditions in the locker room.

Respondent-Union relationship as to in-plant food services

Respondent and International UAW have had a series of collective-bargaining agreements covering plant employees since

4. Moreover, employees may not leave the plant without permission during their 22-minute breaks.

5. Marco while testifying on August 16, 1976, said that he received the last such complaint in May 1976.

approximately 1956 when the International was certified as their statutory bargaining representative. These have actually been national agreements, and the national contract at material times here was effective from November 1973 until September 1976. Pursuant to practice, Local 588 and Respondent have also negotiated a series of local agreements concerning local issues, and the last such agreement ran from June 1974 until September 1976.

Neither the 1973 International Agreement nor the 1974 Local Agreement contains any provision regarding cafeteria or vending machine prices. (During negotiations for the 1974 Local Agreement, Respondent had rejected Local 588's request that it bargain about in-plant food prices.) Respondent has meanwhile recognized "its continuing responsibility for the satisfactory performance of the caterer and for providing the Union with a means for registering and expeditious handling of complaints concerned with such performance." This "recognition" appears as the last paragraph in the following letter of understanding, dated October 29, 1967, from Respondent to Local 588, this letter being included in the parties' 1970 Local Agreement (Jnt. Exh. 8, pp. 5-6):

Improved Vending and Cafeteria Service

This is to advise that in accordance with our discussion during 1967 local negotiations, a meeting was held between representatives of the Company and Al Green Enterprises, Inc. for the purpose of improving cafeteria and vending services.

It was agreed there will be a reassignment of serving and kitchen duties to ensure additional personnel for the serving of steam table items at all times during regular lunch periods.

Additionally, assurance was given that the Cafeteria Manager or an Assistant Manager, during all lunch periods, will be stationed in the cafeteria to ensure the adequacy of food, service, condiments, silverware and utensils.

Silverware will be subjected to continuing additional inspection after washing, and in the event of a temporary

shortage of personnel due to absenteeism, etc., a standby supply of clean silverware will be available to ensure an adequate supply during all feeding periods.

To provide condiments for sandwiches dispensed in the "Coke Cribs," dispensers of mustard and catsup will be installed.

It was further agreed that Al Green Enterprises, Inc. will without undue delay following the strike provide a qualified expert from its home office to study local conditions for the purpose of providing attractive "weekly specials," more varied menus and to devise means for improving cashier service.

Additionally, a vending service specialist will study the plant's vending requirements and facilities, including the added milk, pastry and ice cream machines for the purpose of recommending an improved servicing schedule and any additional manpower necessary to implement such schedules. Each vending crib will be serviced at least once a shift.

To ensure that vending machines will be given prompt servicing in the event of mechanical breakdown, an instant means of communication with the mechanic will be provided.

The Local Agreement of 1970 also contains two other communications from Respondent to Local 588. The first, dated November 15, 1964, reads (Jnt. Exh. 8, p. 40):

Supplemental Eating Facilities

This is to advise that in accordance with our discussions during 1974 local negotiations, the Company intends to install a permanent type eating facility equipped with vending machines in the new addition to serve those employees working in the new addition and the shipping dock.

And the second, dated December 11, 1970, states (Jnt. Exh. 8, p. 7):

Shipping Dock Cafeteria Hours

Following the conclusion of 1970 local negotiations, the Company will arrange for the Shipping Dock Cafeteria to be open on all shifts, at the same times that the main cafeteria is open.

The 1974 Local Agreement contains a letter of understanding from Respondent to Local 588, stating in relevant part that "as discussed in 1973 local negotiations," "The five (5) employee break areas [which I presume are the aforementioned "coke cribs"] will be enclosed and air-conditioned with an adequate number of window type air-conditioning units" (Jnt. Exh. 7, p. 2). In their Local Agreement of 1974 the parties also agreed as follows, concerning "Vending and Cafeteria Service" Jnt. Exh. 7, p. 5):

> 1. CAFETERIA SERVICE
>
> The Company assures the Union that steam table items will be available at all times during the regular lunch period and that a comparable selection of entrees, salads and desserts will be available during all regular lunch periods. In addition, the Company will make arrangements for a delicatessen type sandwich service in the cafeteria. Cafeteria supervision will be available during all lunch periods to ensure that employees will be served in a reasonable length of time through the main serving lines as well as to provide for the adequacy of food service, condiments and utensils.
>
> 2. VENDING SERVICE AND VARIETY
>
> To assure that vending machines will receive prompt servicing in the event of a mechanical breakdown, a sticker will be affixed to each machine indicating the number to call for repair. Further, the Company assures the Union that a greater variety of selections will be maintained in the existing vending machines and that the quality of such items will continue to meet Company standards.
>
> The Company recognizes its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance.

The 1970 and 1974 Local Agreements also show that the parties have discussed and that Respondent has agreed on various items of plant maintenance, including the inspection and improvement

of ventilation systems affecting, among others, the plant locker room (Jnt. Exh. 7, pp. 3-4; Jnt. Exh. 8, p. 4).

The current dispute

On or about February 6, 1976, Respondent informed Local 588 that ARA would be increasing the prices of certain cafeteria and vending items, effective February 9, 1976. Local 588 had not been previously advised of the increases, and Respondent did not furnish specific information on February 6 about the amount of the increases. Local 588 requested at the time that the increases be postponed until Local 588 could discuss the matter with Respondent, but Respondent refused. The increases went into effect on February 9; most affected items were raised 5 cents and some were raised 10 cents. By letter dated February 13, 1976, Local 588 asked Respondent to bargain concerning "prices and services in cafeteria and vending operations," and Respondent again declined on February 19 for the stated reason that "food prices and services are not a proper subject for negotiations."

By letter to Respondent on March 23, 1976, Local 588 requested certain information concerning Respondent's role in cafeteria and vending operations in order, the letter stated, to administer existing collective-bargaining provisions (the June 20, 1974, agreement set forth above) and to prepare for upcoming negotiations in September 1976 when, by their terms, the national and local agreements between Respondent and the Union would expire. Local 588 thus sought, among other things, information as to Respondent's maintenance responsibilities, Respondent's profits from the food operations, Respondent's control of prices, and Respondent's contractual arrangement with any food supplier. On April 9, 1976, Respondent turned down Local 588's request for information and again refused, and it has continued to refuse, to bargain about cafeteria and vending prices.

Meanwhile, on February 16, 1976, Local 588 began a boycott of the food services operations. "Substantially in excess of half of the members of Local 588" observed the boycott, according to the parties' stipulation, and most of these observing employees brought in their lunches during the period. Local President Marco testified that a few employees left the plant to eat and that some employees did not eat at all. The boycott did not cause any price reductions, with the possible exception that some special dishes were made available. The cafeteria boycott was ended by Local 588's Shop Committee on May 19, 1976, and the boycott of vending machines was terminated on June 7, 1976. Contributing to this decision to call off the boycott, according to President Marco, was the onset of hot weather with consequent problems of spoilage of food the employees brought into the plant. It may be fairly said, however, and I find that a substantial reason for abandoning the boycott was its ineffectiveness in reducing prices.

In July 1976, the International notified Respondent of its desire to terminate their current national contract and all local agreements. While not in this record, the news media report that Respondent and the International have concluded negotiations for a new contract. However, no party has requested that the results of these latest negotiations be made part of this record, and nothing further need be said in that regard.

Does the Act require Respondent to bargain concerning the prices of in-plant food?

Board and Court Decisions

By a divided vote (3-2) in *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), the Board held that an employer in an urban industrial setting is required under the Act to bargain with a statutory representative of its plant employees concerning food prices charged in on-site cafeterias. The in-plant cafeteria facilities were operated by a catering service pursuant to contract

with Westinghouse; under the contract, the caterer paid Westinghouse a rental of $1.00 a year and Westinghouse provided the capital equipment necessary for operating the facilities. The catering contract also provided, among other things, that the "quantity and prices of the meals served, and the hours of service thereof . . . shall at all times be reasonable" and it also gave Westinghouse a right to conduct periodic audits of the cafeteria accounts. The caterer announced an increase in the price of a food item and the union involved sought to meet and discuss the matter with Westinghouse. Westinghouse refused the union's request, and the Board concluded in finding a violation of Section 8(a)(5) that it is "within the objective and meaning of the Act to require parties to submit such controversies to the healing processes of collective bargaining" (156 NLRB at 1082).

On review of the *Westinghouse* case, a divided Court of Appeals, sitting en banc, reversed the Board and held that the in-plant food prices were not a mandatory subject of bargaining. *Westinghouse Electric Corporation* v. *N. L. R. B.*, 387 F. 2d 542 (C. A. 4, 1967). The Court stated in part that "The case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider vital. *Nor is there any evidence that the inclusion of this issue here within the collective bargaining framework is a widespread industrial practice*" (387 F. 2d at 548, emphasis added).[6]

In *McCall Corporation*, 172 NLRB 540 (1968), employees were able to purchase food "in a company-owned and -operated cafeteria" and "out of vending machines owned by a contractor but supplied with company cafeteria-prepared and -priced food" (172 NLRB at 541). There were some 16 unions in the plant, and McCall refused to negotiate with one of them concerning food prices. Citing its *Westinghouse* case, *supra*, and an earlier *Weyerhaeuser* case (87 NLRB 672) involving a sawmill and lumber camp setting, a Board panel concluded that food prices

6. Nor was such evidence offered in the present case.

"constitute 'conditions of employment' and bargainable matters" and that McCall violated Section 8(a)(5) by refusing to bargain over such prices. By divided vote on review, the Fourth Circuit found that "the difference between the indirect control exercised in *Westinghouse* and the direct control in *McCall* over the quality and prices of food is not of sufficient significance to affect the result." *McCall Corporation* v. *N. L. R. B.*, 432 F. 2d 187, 188 (1970). The Court rejected the Board's request that the Court overrule its *Westinghouse* ruling and it set aside the Board's *McCall* decision.

The next in this series of cases cited by the parties is *Package Machinery Company*, 191 NLRB 268 (1971), reversed 457 F. 2d 936 (C. A. 1, 1972). The company in this case had a contract with a caterer to operate in-plant cafeteria and vending machine services, and under their arrangement the company paid a specific monthly subsidy to the caterer. The union involved requested that the company furnish it a copy of the company's contract with the caterer and that the company bargain with it concerning food and beverage prices. The company refused, and a Board panel found a violation of Section 8(a)(5) upon the basis of its *Westinghouse* and *McCall* decisions. Referring to the aforementioned Court decision in *Westinghouse*, the First Circuit set aside the Board's *Package Machinery* order and observed, *inter alia*, that "If food costs go up from time to time, as inevitably they seem to, it would appear more appropriate to bargain over wages . . . ." (457 F. 2d at 938).[7]

Finally we come to *Ladish Co.*, 219 NLRB 354 (1975), where, as the General Counsel mentions, the Board undertook a "thorough examination" of the issue presented here (G. C. Br., p. 15). The employer in that case made hot and cold food available to its employees through contracts with vending machine companies (caterers). The caterers determined the

7. The 1973 contract between Respondent and the Union included wage increases as well as a cost-of-living allowance geared to the Combined Consumer Price Index (Jnt. Exh. 4, pp. 96-97).

prices of food items and the employer received from the caterer a commission on food sales to cover the use of floor space, overhead, and operational costs. Employees received a 15-minute paid lunch period and were not permitted to leave the plant for lunch. About 70 percent of the employees purchased their lunches from vending machines, 90 percent obtain beverages from the machines, and the other employees bring their lunches. One of several involved unions filed a grievance protesting an increase in all food items, and the employer's response was to refuse to negotiate. In a full-dress discussion of the issue, as indicated above, a Board panel (with one dissent and one concurrence) concluded that in-plant food prices "constitute 'conditions of employment' and bargainable matters" (219 NLRB at 358), and it directed the employer to bargain concerning those matters.

The Board brought enforcement proceedings before the Seventh Circuit in the *Ladish* case. Denying enforcement and in effect joining the First and Fourth Circuits, the Court held that "vending machine food prices are not a material or significant condition of employment at Ladish. The impact of these prices is too remote to require bargaining." *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d 1267, 1272 (C. A. 7, 1976).

The Board did not file a petition for certiorari in *Ladish*.

Discussion

The facts of the present case fall within the factual-legal contexts of the *Westinghouse, McCall, Package Machinery*, and *Ladish* cases. It is unnecessary, in my opinion, to have discussed these cases in greater detail for it is beyond question that in-plant food prices are a mandatory subject of bargaining on the basis of the mentioned Board decisions. It seems equally clear that such prices are not a required subject of bargaining if the mentioned court decisions be controlling. The present case is therefore not one that requires in-depth analyses of the cases and of underlying theory.

Administrative Law Judges are bound by Board decisional law, needless to say, despite reversals on the same point of law by Courts of Appeals. The question I have, however, is what interpretation to accord the Board's determination not to seek certiorari in the *Ladish* case. Complicating the problem is the fact that such determination might have been influenced by the lack of a conflict between the Circuits and the Board's awareness of the difficulty of obtaining Supreme Court review without a conflict. In other words, it is possible that the Board may still be desirous of testing the issue in other Courts of Appeals before giving up on the issue or before seeking certiorari without a conflict.

With less certainty than I would like, I nonetheless conclude that the action of the Board in not seeking certiorari in the *Ladish* case is more significant than might generally be the situation. When the Board decided the *Ladish* case, it had been reversed by the First and Fourth Circuits, and its decision in the *Ladish* case represented a "thorough examination" of the issue and was, in fact, a major decisional effort. On its facts the case was a strong one, in my opinion, for presenting the Board's position on the issue.[8] Having made this major effort and lost again and then determining not to seek certiorari in the *Ladish* circumstances, the Board has now decided to hold—at least I so interpret its action—that in-plant food prices are not a mandatory subject of bargaining. I thus conclude that Respondent did not violate the Act by refusing to bargain about such prices and that it also did not violate the Act by refusing to furnish information in such connection. Nor is this result affected by the fact that Respondent has bargained with Local 588 concerning other (non-price) aspects of its in-plant food facilities. *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d at 1272.[9]

8. It is noted that in its Brief (p. 16) filed with the Court in the *Ladish* case, the Board urged that the facts therein "are stronger" than in the *Westinghouse, McCall,* and *Package Machinery* cases.

9. In view of these conclusions, it is unnecessary to consider Respondent's "zipper-clause" contention.

I shall accordingly recommend that the complaint be dismissed.

Conclusions of Law

1. Respondent is an employer within Section 2(6) and (7) of the Act.

2. The Union is a labor organization within Section 2(5) of the Act.

3. Respondent has not engaged in the violations of Section 8(a)(1) and (5) alleged in the complaint.

Upon the foregoing, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

It is ordered that the complaint be dismissed.

Dated at Washington, D. C.

/s/ RALPH WINKLER
Ralph Winkler
Administrative Law Judge

10. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 23, 1978

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

FORD MOTOR CO. (CHICAGO STAMPING PLANT), *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent,* and LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *Intervenor.*	No. 77-1707 — On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by petitioner, Ford Motor Company, no judge in active service has requested a vote thereon, and all of the judges of the original panel have voted to deny a rehearing, Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Hon. Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT), *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, and LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *Intervenor.*	No. 77-1707

JUDGMENT

Before: SWYGERT and SPRECHER, *Circuit Judges* and GRANT, *Senior District Judge.**

THIS CAUSE came on to be heard upon the petition of Ford Motor Company (Chicago Stamping Plant), to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors and assigns and upon the Board's cross-application for enforcement of said order. The Court heard argument of respective counsel on January 10, 1978, and has considered the briefs and transcript of the record filed in this cause. On February 22, 1977, the Court being fully advised in the premises handed down its opinion denying the

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Ford Motor Company (Chicago Stamping Plant), its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Petitioner.

/s/ ROBERT A. SPRECHER
Judge, United States Court of Appeals for the Seventh Circuit

APPENDIX E

Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (61 Stat. 140-3, as amended, 29 U. S. C. 158) provide in pertinent part:

"(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . ."